

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KEION LASHAWN LEE
MERRITT, RICHELLE RA'VON MERRITT, and
ANGEL VASQUEZ, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANGELA LOUISE WELCH,

Respondent-Appellant,

and

LEE DON MERRITT, a/k/a LE DEON MERRIT,

Respondents.

UNPUBLISHED
November 25, 2003

No. 242051
Wayne Circuit Court
Family Division
LC No. 91-292717

Before: Murphy, P.J., and Cooper and C. L. Levin^{*}, JJ.

PER CURIAM.

Respondent Angela Welch (hereafter “respondent”) appeals as of right the September 8, 2000, order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(g) and (j).¹ We affirm.

In 1999, petitioner sought termination of respondent’s parental rights on the basis of recent neglect and a past history in a child protective matter from 1992 to 1995. The trial court subsequently held a trial on the parental termination petition. The principal witness at the trial

^{*} Former Supreme Court justice, sitting on the Court of Appeals by assignment.

¹ The court also cited §§ 19b(3)(h) and (k), but these subsections clearly apply only to respondent Lee Don Merritt, who is not a party to this appeal.

was Lillette Butler, a Protective Services worker. The only other witness to testify, co-respondent Angel Vasquez, Sr., gave little testimony pertaining to respondent. The trial court terminated respondent's parental rights. In a written opinion, the trial court found that respondent neglected her infant son's fragile medical needs by failing to supervise him and use an apnea monitor. The trial court also found that respondent had a long history of substance abuse and failure to benefit from treatment. The court also generally alluded to respondent's past history with petitioner.

After this appeal was filed, respondent's appellate counsel was advised that the court reporter's recording of the first day of trial, March 13, 2000, was missing and, accordingly, a transcript of that hearing could not be prepared. When a transcript is lost, MCR 7.210(B)(2) requires the appellant to file a proposed statement of facts to substitute for the missing transcript, and notice it for settlement before the trial court. The trial court must then consider the opposing parties' objections and certify a settled statement of facts as an "accurate, fair, and complete statement of the proceedings before it." MCR 7.210(B)(2)(c). In this case, however, resort to that procedure was problematic because respondent's appellate counsel did not serve as respondent's trial attorney, who had since died.

On respondent's motion, this Court remanded the matter and directed the hearing referee to settle the record pursuant to MCR 7.210(B)(2). The referee subsequently directed petitioner's trial counsel to prepare a proposed statement of facts regarding Butler's testimony, and instructed the attorneys for respondent, the respondent-fathers, and the minor children to file stipulations or objections. Respondent's appellate counsel objected to this procedure, arguing that she had no basis for assessing the accuracy or completeness of petitioner's proposed statement. Over respondent's objection, the hearing referee adopted petitioner's proposed settled statement of facts, and this Court accepted the statement in satisfaction of its order.

Respondent argues that the settled statement of facts is inadequate to allow for proper appellate review, and that the appropriate remedy is to either remand for a new trial or retake Butler's testimony. We find it unnecessary to do so.

We first note that this Court, when faced with the issue of the missing recording and the problem of respondent's trial counsel being deceased, ordered the case remanded for settlement of the record by the hearing referee. The remand order was carried out by the hearing referee, and this Court accepted the settled statement of facts; therefore, we find that it would improperly contravene this Court's prior order if we were to revisit the issue whether a settled statement of facts is appropriate under the circumstances presented. Moreover, respondent's due process rights were not offended, where the hearing referee, who presided over the termination trial, found the settled statement of facts to be accurate, and where respondent herself appeared on the first day of trial. Clearly, respondent's new counsel could have conferred with respondent regarding the accuracy of the settled statement of facts. We also note that there does not appear to be any substantive factual dispute with respect to Butler's testimony as reconstructed and as it related to events surrounding this case. Therefore, we accept the settled statement of facts.

The settled statement of facts reveals that Butler testified that respondent failed to comply with the parent-agency treatment agreement, that respondent admitted to using crack cocaine

before the birth of Angel Vasquez and admitted having a substance abuse problem, that respondent was instructed that Angel was to sleep on his back and with an apnea monitor because of two prior SIDS² deaths of children of respondent, that on four home visits Angel was sleeping on his stomach and/or without the apnea monitor attached, and that the two older children suffer from Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder. Additionally, the record includes documentation concerning a prior temporary wardship from 1992 through 1995 in regard to the two older children.³

Respondent argues that the trial court erred in finding clear and convincing evidence of the statutory grounds to terminate her parental rights pursuant to MCL 712A.19b(3)(g) and (j). Review of this issue requires a determination of whether the trial court made clearly erroneous findings of fact with respect to the statutory grounds for termination. MCR 5.974(I); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The settled statement supports the trial court's finding that respondent violated medical instructions with regard to supervising and caring for her child and using the apnea monitor. This establishes support for the court's finding that respondent failed to provide proper care and custody for Angel, as required by MCL 712A.19b(3)(g). Additionally, the fact that there were four occasions on which Angel was discovered lying on his stomach and/or without the monitor connected, along with respondent's history as reflected by documents concerning the prior wardship, provided sufficient evidence to support a finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time, and that Angel would likely be harmed if returned to respondent's care. MCL 712A.19b(3)(g) and (j).

The trial court also cited evidence that respondent has a long-term substance abuse problem and a long history of failing to benefit from treatment. The settled statement of facts, as noted above, indicated that respondent admitted to using crack cocaine throughout her pregnancy and to having a substance abuse problem.⁴ Considering this evidence, along with the record from the prior wardship, the trial court did not clearly err with respect to the finding concerning substance abuse. We conclude, with respect to all three children, respondent's substance abuse history supports termination under MCL 712A.19b(3)(g) and (j). Respondent's inability to properly care for Angel Vasquez also reflects negatively on her ability to properly care for the two older children who suffer from psychological disorders. Additionally, the settled statement of facts shows a failure to comply with the parent-agency agreement.

Because at least one ground for termination was established, the court was required to terminate respondent-appellant's parental rights unless the court found that termination was

² Sudden Infant Death Syndrome (SIDS).

³ The record of the preliminary hearing indicates that on the day the children were removed from the home in October 1999, respondent was picked up by police on an outstanding drug trafficking warrant.

⁴ We acknowledge the negative drug screens covering a two-month period, but find it insufficient to overcome respondent's substance abuse history.

clearly not in the children's best interest. MCL 712A.19b(5). We find that the trial court's ruling terminating respondent's parental rights to the minor children was not clearly erroneous.

Affirmed.

/s/ William B. Murphy

/s/ Jessica R. Cooper